

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
OPELOUSAS.

JUNE, 1877.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,

HON. A. DEBLANC,

HON. W. B. SPENCER,

HON. W. B. EGAN,

} *Associate Justices.*

No. 990.

SUCCESSION OF RAPHAEL ROMERO. ON OPPOSITION TO ACCOUNT.

The acknowledgment of a succession debt by the administrator, interrupts its prescription.

A debt of a succession, once acknowledged by the administrator, whether the debt be in the form of a note, or open account, if prescriptible thereafter, is only prescribed in *ten* years.

APPEAL from the Parish Court, parish of St. Martin. *Fournet, J.*

L. J. Gary, Edward Simon, and DeBlanc B. Fournet, for appellant.

F. & M. Voorhies and Mouton & Martin, for opponent.

The opinion of the court was delivered by

MANNING, C. J. The succession of Raphael Romero was opened in 1865, and was administered by Cleophas Romero until his own death. In 1869 Numa Babin was appointed administrator, and filed an account some years afterward, which was opposed by the heirs and by some of the creditors. The plea of prescription of five years is opposed by them to several claims, admitted by the former administrator to be just, and placed by the present administrator upon his tableau of distribution.

The claim of Lafitte, Dufilho & Co. is one of them thus opposed. These creditors had instituted suit against the first administrator and obtained judgment upon their note. The plea is based upon an allegation that the citation which preceded the judgment was so defective that the judgment was a nullity, but these defects are not pointed out. The objection was frivolous, and was so held by the lower court.

The same disposition was made of other oppositions, but some of them were maintained, and it is only necessary for us to review the judgment as to them.

Sylvestre Romero holds a note of the deceased for thirteen hundred dollars and interest, payable on demand, and dated twenty-third of February, 1861. He presented this note to Cleophas, the first administrator, on the twentieth of January, 1866, for recognition, and he wrote on the back of it the following:

"I acknowledge that this note is due, less the amount on the back. I will pay it in the course of my administration of the succession of Raphael Romero. Dated twenty-sixth of January, 1866.

"CLEOPHAS ROMERO, Administrator."

On the twelfth of April, 1870, Babin paid Sylvestre Romero two hundred dollars out of the succession funds, in part of this note.

On the tenth of March, 1875, the administrator filed his tableau of distribution, and placed thereon this note as an acknowledged and recognized debt of the succession.

The administrator receipted to his attorney on the seventeenth of April, 1876, for a payment made on this note, and, notwithstanding this continuous recognition, and, we presume out of abundant caution, suit had been instituted on the note and citation served on the administrator on the thirtieth of January, 1871.

It is difficult to comprehend how a plea of prescription can be successfully opposed to this note.

Our law for the settlement of successions does not contemplate or encourage suits against them except when the representative of the succession refuses to recognize the claims. All persons holding claims against deceased persons are required to present them to their representatives, and if they shall recognize the claim as valid and just, and write on the back of it, or on an annexed paper, a statement to that effect, the holder of the claim is not expected to bring a suit upon it, and if he does, the succession is not chargeable with the costs. It is evident that the judge of the court *a qua* applied the prescription of five years in his judgment sustaining the opposition, and this is an error. Before the prescription applicable to notes (*i. e.* five years) had accrued the holder of the note had obtained the written acknowledgment of the administrator in exact conformity with the requirements of the Code of

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Practice, articles 984 *et seq.* If any prescription was applicable to this acknowledged claim thereafter, it could only be that of ten years.

The accounts of Cleoma Romero, Aristide Romero, and other heirs were sworn to before a justice of the peace as being correct, a practice that has grown up in this State, to serve what purpose it is difficult to conjecture. They were never acknowledged by the administrator, and are prescribed.

The commissions of the administrator were rightly reduced to two and a half per centum upon that part of the succession property that he had already administered. The practice of administrators charging their full rate of commission upon the whole of the inventoried property before their final account, and consequently before it can be known that they will administer the whole succession, is apt to entail upon estates double commissions when, as in this case, there have been two administrators.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be reversed as to that part thereof which sustained the opposition to the note of Sylvestre Romero, and that said claim remain on the tableau of distribution of the administrator as classified by him, and that in all other respects said judgment is affirmed, the costs of the oppositions to Sylvestre Romero in both courts to be paid by the opponents, and all other costs to be paid by the appellants.

No. 987.

SUCCESSION OF J. B. GUILLORY. OPPOSITION OF HEIRS.

Parol evidence is admissible to explain, but not to vary a written instrument.

Slaves given to children by a father, or mother, having been destroyed without their fault (by the late war between the States) are not subject to collation. C. C. 1250.

A PPEAL from the Parish Court, parish of St. Landry. *Reid, J.*

Lewis & Brother, for succession and appellee.

A. Bailey and *Joseph M. Moore*, for the heirs.

The opinion of the court was delivered by

MANNING, C. J. Jean Baptiste Guillory died in 1875. His administrator has filed an account and tableau of distribution, which is opposed by some of the heirs.

In 1860 the decedent and his wife made a donation by notarial acts to six of their children—to each one a slave valued at eighteen hundred dollars and a small sum of money—and the donors declared that the gift

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is made as an advance upon their inheritance, *à titre d'avancement d'hoirie*, and imposes upon them the obligation of collating it. The donees accept without reserve. In some of these acts the donation is in form of money, but they were accompanied or followed by other acts in which the donor appears in the character of vendor of the slave, receiving from the donee (who is vendee therein) the price in money, which is a part of the sum just donated.

In 1872 the donor by notarial act declared that all of these donations were in reality of slaves, valued in the sum above mentioned, and that they are to be considered null and void, and that the conditions and requirements therein mentioned "be considered as if no donations had been made, as the property donated proved to be useless to the donees on account of the emancipation thereof."

In the following year the decedent and his wife made another formal notarial act of explanation, renunciation, and discharge in favor of their children, the recitals and declarations of which are in accord with those previously made. This act appears to have been executed out of abundant caution, in order that the real intent of the parties may not be left in doubt, and contains the renewal in even more explicit words of the release of the children from the obligation of collating any thing but the money actually received by them.

Shortly after the death of Guillory, viz.: in 1876, his heirs by notarial act of partition treated his estate as a common inheritance, in which all had an equal share, by dividing equally among themselves the cash on hand, and they all agreed to give the surviving widow twelve hundred dollars in consideration of her release of her claims in community.

The administrator effectuates these intentions of his intestate in the account now attacked, and distributes the funds in accordance with them. The opponents maintain that the heirs should be charged with the full amount of the donations, which of course includes the value of the slaves.

The administrator answered the oppositions, and objection was made to his filing the answer on the ground that it was a replication, which our system of pleading does not permit. The objection was good; but we must confess that the statement in that answer of the basis upon which the account is made places the issue in bolder relief, and enables us to seize the salient points of the contestation with more readiness. If it had been incorporated in the petition accompanying and presenting the account the same useful purpose would have been served, and it would have been relieved of the objection to its form and to the place assigned it in the pleadings.

The refusal of the administrator to charge the heirs, who were donees of the slaves, with their expressed value is based upon the inhibition of

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the constitution against enforcing contracts for the sale of slaves, and the jurisprudence of the State, which is claimed to be settled by numerous decisions of this court. The opponents reply that these donations were executed contracts, by and under which the donees became owners of the slaves, and *res perit domino*.

Parol testimony was offered and received to support the recitals in these donations, to which objection was made upon the ground that such testimony was not admissible to vary or contradict the written instruments. But the object of the testimony was not to vary or contradict the recitals in the written instruments, but rather to elucidate and explain them. Indeed, these written instruments taken together explain themselves and do not leave the intentions of the donors in doubt.

The opponents then maintain that the money or property given to these children must be collated unless the donor has formally expressed his will that what he thus gave was an advantage or extra part, and that the contrary was expressed by the donor in these acts, and that if upon calculation of the value of advantages thus given, and of the other effects of the succession, such remaining part shall prove insufficient to give to the other children their legitimate portion, the donee would then be obliged to collate the sum received by him so far as necessary to complete such portion. Civil Code, articles 1309, 1312 (new Nos. 1231, 1234).

We think another provision of our Code furnishes the true clue to the solution of the present controversy, and that is the provision that immovable property given by a father, mother, or other ascendant to one of their children or descendants, which has been destroyed by accident while in the possession of the donee, and without his fault, previous to the opening of the succession, is not subject to collation. If, on the contrary, it is by the fault or negligence of the donee that the immovable property has been destroyed, he is bound to collate to the amount of the value which the property would have had at the time of the opening of the succession. Civil Code, art. 1328 (new No. 1250).

The property donated by this decedent and his wife to their children perished by the accident of war, and without their fault, and is not therefore subject to collation, and the omission of the administrator to charge them with its value was right and proper.

This disposes of the main issue in this case. The other objections made by the opponents to the account were considered by the judge of the court *a qua*, and correctly disposed of by rejecting some of them and amending the tableau in conformity with others. The judgment thus rendered is in accordance with the law and the evidence; and

It is therefore affirmed, the costs of this court to be paid by the opponents.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

MANNING, C. J. The opponents in applying for a rehearing urge upon us the fact that the obligation of the donees was fixed by the law in existence at the time of the act of donation, and seem to suppose that our judgment was affected by or based upon the change in our laws relative to property in slaves. This was not in our minds. We purposely divested the question of whatever influence that change in the law might have had in the absence of that provision of our Code which controlled our judgment.

The article 1328 of the Civil Code (new No. 1250) was a part of the law at the time the act of donation was passed, equally with those relating to collation cited by opponents in their application for rehearing. It was unnecessary for us to go into an examination of the effect had upon contracts by the changes in our laws relative to slaves, so far as they formed part of the consideration of such contracts.

Independent of these changes, and independent of the provisions concerning collation of the different kinds of property, there is that in article 1328 that imperatively prescribes that immovable property given to one of the children, that has been destroyed by an accident without his fault, is not subject to collation at all, and because the property donated in the case before us had been thus destroyed, we decided that it should not be collated.

The rehearing is refused.

No. 961.

JAMES TODD VS. M. T. GORDY, SHERIFF, ET AL.

If the property pointed out by a debtor to his seizing creditor is incumbered by recorded liens which exceed its value, the creditor may disregard the debtor's election, and seize other property of the latter.

When a third person intervenes in a suit, and by an illegal order of court takes possession of property involved in the suit, on executing a bond for its value, he, and his surety will be liable on the bond. Such a bond, though not a judicial bond, is a binding conventional obligation for its full amount.

A PPEAL from the Third Judicial District Court, parish of St. Mary, Train, J.

F. L. Gates, E. Simon, and Allen & Foster, for plaintiff and appellant.
D. Caffrey, for appellee.

The opinion of the court was delivered by

MANNING, C. J. Wilson McKerral, a judgment creditor of James Todd, with recognition of mortgage upon the Arlington plantation, issued exe-

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cution, and by his direction the sheriff levied upon twenty hogsheads of sugar for its satisfaction. Before levying the writ of *fieri facias*, the officer required the judgment debtor to point out property for seizure, who accordingly designated the mortgaged premises for that purpose. The officer refused to seize that property under instructions of McKerall's counsel, because it was burthened with anterior mortgages sufficient in amount, as appeared from the mortgage books, to cover its full value. Todd refusing to point out other property, the sheriff seized sufficient sugar to satisfy the judgment, and the debtor enjoined its sale.

J. B. Lyons intervened in this injunction suit, alleging that he was pledgee of the sugar for supplies and advances used in its cultivation, and upon application to the court was permitted to take possession of it, and gave bond for its restitution or its value. The defendant, McKerall, took a rule to set aside the order permitting Lyons to bond the sugar, and on its trial the order was vacated as having been made in error, and, it being impossible to restore the sugar to the possession of the sheriff, because of its removal, McKerall prayed that Lyons and his surety be ordered to deposit its value in court, and this was refused.

From this order of refusal the defendant appealed. The trial, however, proceeded, and resulted in a dissolution of the injunction without damages, and a dismissal of the intervention. We are asked to dismiss the appeal from the interlocutory order. It would be inutile either to consider or to dismiss it. The whole case is before us, and a decree upon the final judgment will dispose of all the issues.

The ground of complaint of plaintiff is that his mortgage creditor having elected not to proceed against the mortgaged property, and having called on him to point out property for seizure, refused to seize what was specifically pointed out to him, and did seize movables for the satisfaction of his judgment. His construction of the directions of the Code of Practice (articles 646-8), is that when the creditor declines or refuses to exercise his rights upon property specially mortgaged to him, and calls on the debtor to point out property for seizure, he is bound to pursue first that which has been or is thus specially pointed out by the debtor, and can not pursue any other until he has exhausted that. If the correctness of this construction be admitted in its entirety, it is also true that where the property thus pointed out by the debtor is so incumbered by liens, mortgages, or privileges anterior to that of the seizing creditor that its sale will not probably satisfy the claim of that creditor, he can lawfully disregard the selection of property made by the debtor for seizure, and proceed against other property in the mode and according to the order prescribed by the Code.

And such was the fact here. The records of the mortgage office disclosed a vendor's lien for eleven thousand dollars, and a recorded inven-

tory of over ninety thousand dollars of property belonging to a minor, of whom Todd was co-tutor, both of which primed the mortgage of the defendant. And it is not pretended that the value of the property equaled the aggregate of these two sums. It is, however, said that this last was but a shadow resting upon the property, and proof was tendered to show that nothing was due the minor, or that the lien thus, in appearance, clogging the property had no real existence. To this it was excepted that the examination of the minor's affairs could not be made in this action, and this was neither the time nor the occasion for ascertaining whether the lien which confronted the defendant at the time of seizure was rightfully or wrongfully there. If there wrongfully, it was the plaintiff's and debtor's business to have removed it before.

Unquestionably this was right. When the judgment debtor points out property to his creditor for seizure, he can not complain if that creditor disregarded the selection, when he finds it incumbered upon the mortgage records by liens exceeding its value. If he wishes to secure to himself in its fullness the right to point out his mortgaged property to any seizing judgment creditor, he should take care that no liens should remain upon the records, save those which have actual existence.

The seizure of the sugar was therefore made by the defendant in the exercise of his legal right, and the process of injunction, by which he was restrained from making the proceeds of its sale available for the payment of his debt was wrongfully employed. He prayed damages, which were not allowed by the lower court, and we shall amend the judgment in that respect.

And here it becomes necessary to consider the effect of the judgment of the lower court. It dissolved the injunction, but meanwhile an intervenor had removed the property seized, under authority of the court, leaving a bond to represent it, which it is said is of no validity, because executed under an illegal order, so that the judgment debtor enjoins the sale of his property under the pretext that his creditor must first discuss other property incumbered on the face of the record beyond its value, and while the creditor is thus fast bound by the cords of the law, another creditor whose interest the debtor feels himself "morally and legally bound to protect," intervenes and bonds by proxy the seized property, removes it, converts it to his own use, and leaves a worthless paper to represent the tangible property, the sale of which would have satisfied his claim. Courts of justice are but a mockery if they can not find and apply a remedy for such trifling with their procedure.

The bond thus given by the intervenor is not a judicial bond. The court had not authority to direct that it should be taken. The intervenor was an interloper in this contestation, and should not have been permitted to take the property. But he did take it, and at the moment

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of taking it covenanted that he would restore it when the court should so order, or pay its value. He can be compelled to perform his covenant by an action upon the bond. Not being a judicial bond, the process for the enforcement of those instruments can not be invoked by him, but it is a conventional obligation upon which himself and his surety can be pursued.

There were four executions enjoined, and all have been included in one transcript and cumulated. Two of them were for the American Colonization Society, and the plaintiff produces in this court receipts of that society for the payment of its judgments, and moves for the dismissal of those appeals, and it is so ordered.

Two other appeals are from the judgments dissolving the injunctions against McKerall's process, and these are the cases we have been considering.

This transcript is the most ill-arranged and badly prepared of any we have yet examined, and furnishes a fitting occasion to say to the clerks of the lower courts that we shall hereafter enforce the rule which provides for the preparation of a new transcript at their expense, if the transcripts in future appeals are made in disregard of the directions contained in that rule. These directions are contained in Rule I, and are accessible to all persons, and easily understood. An officer who desires to perform his duty can not fail with small effort to ascertain from these directions what is required of him; and as a return of the transcript for its improvement or entire rewriting will entail delay in the hearing of the cause by operating a continuance, it behooves those who would avoid such delay to take care that transcripts are not laid before us in such disorder as was confessed in the oral argument in this cause characterizes this one.

It is ordered, adjudged, and decreed that the judgment of the lower court be amended by awarding to Wilson McKerall five hundred dollars special damages as attorney's fees in the two cases, and twenty per centum upon the sum enjoined as general damages, and, as thus amended, that it be affirmed with costs of both courts. It is further decreed that the appeals from the judgments in the suits where the American Colonization Society is a party be dismissed on motion of appellant and at his costs.

No. 976.

HERRMANN & VIGNES VS. L. FONTELIEU, ADMINISTRATOR, ET AL.

In an action to annul a sale of property made by an administrator, he must be made a party.

A suit to annul an administrator's sale is not of a probate character, and, if the amount involved is large enough, should be brought in the district court.

In sales of succession property, even to pay debts, the property must bring the *full amount of its appraisal*, or be subsequently sold on credit. But such sales, even when the property is sold below its appraisal, will not be disturbed if it be shown that the property brought its *actual value*.

A PPEAL from the Sixteenth Judicial District Court, parish of Vermillion. *Mouton, J.*

F. R. King, for plaintiffs and appellants.

Joseph A. Breaux, for defendant.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. Laodice Fontelieu administered upon the succession of his brother Paulin, and obtained from the parish court of Vermillion an order for the sale of the property of the deceased, and on the eighteenth of November, 1875, adjudicated it to Ernestine Fontelieu, the wife of his brother Theodore.

In the following June, the plaintiffs, who are judgment creditors of the deceased, instituted this suit against the administrator and the purchaser, the object of which is to annul this sale. The grounds of nullity are:

First—That no order of sale was in force at the date of the sale.

Second—That the sale was made without a commission therefor from the court.

Third—Want of legal advertisement.

Fourth—The sale was for payment of debts, and the bid was less than two thirds of the appraised value in the inventory, and less than one fourth of the actual value of the property.

Fifth and sixth—The purchaser was cognizant of the irregularities of the proceedings, and entered into a combination with the administrator to sacrifice the property and obtain it for an inconsiderable sum; and,

Seventh—That no price was paid.

The defendants excepted to the action—the purchaser, because of non-domicile in Vermillion parish, she being a resident of Iberia—the administrator for the same cause, and also because the action is not maintainable against him, but only against the heirs, if at all, and the same issue has been made in another suit, and decided adversely to plaintiffs, and upon this is based the plea of *res judicata*. It is also excepted that the probate court alone has jurisdiction of this action. Thereupon the plain-

tiffs dismissed their suit against the administrator, and the trial was upon the issue presented by the purchaser.

This voluntary act of the plaintiffs will prevent us from making a final disposition of the suit. The vendor is a necessary party to an action the object of which is to annul a sale made by him, and we shall remand the case in order that the plaintiffs may put their pleadings in such shape as will justify the judgment they seek, and shall dispose of some of the issues made here, in order to facilitate the trial hereafter to be had.

The exceptions were overruled, and the defendant, Ernestine Fontelieu, answered that the action can not now be maintained, since the administrator is no longer a party to it; that the plaintiffs can not retain the price and at the same time annul the sale, and that the proceeds of sale have been distributed, and the decree of annulment would be virtually the reversal of the decree of the parish court.

There was judgment for defendant, and the plaintiffs appeal.

The previous judgment, pleaded as *res judicata*, was rendered upon an opposition of plaintiffs and others to the provisional account and tableau of distribution of the administrator. Our predecessors remarked upon that suit that it was an attempt to annul a judicial sale by a collateral proceeding to which the vendee is not a party. Succession of Paulin Fontelieu, Opinion Book. So far, therefore, as the question of annulment is concerned, not being before the court, that part of the judgment which relates to that issue may be regarded as *obiter dicta*, and not pleadable as the thing adjudged. One of the requisites needful to sustain that plea, viz., identity of parties, is wanting, and furnishes an additional reason for the rejection of that plea as a bar to the present demand.

The suit was properly brought in the district court of Vermillion. The proceeding is not probate in its nature, and the land is of value requiring the jurisdiction of the district court, and its situation in that parish determines the jurisdiction, though the residence of the defendant is in another.

To remand the case without some observations upon the grounds of annulment would leave the parties in the same incertitude in which they were at the inception of these proceedings, and silence upon the *dicta* in the opinion rendered in the previous case might well be construed into acquiescence in their correctness.

The sale is unquestionably null. The orders of the thirteenth of October were not complied with, and they were certainly within the competency of the court. Notwithstanding a pending proceeding for the dismissal of the administrator for want of sufficient bond, and notwithstanding the special designation of the sheriff as auctioneer to make the sale, the administrator precipitated it with indecent haste, forgetting to make

advertisement himself, though he had assumed to discharge the function of an auctioneer, which the law permits as to the property he is administering, but only when the court has failed to designate an officer to that end. The published notice of sale is signed neither by himself nor by any auctioneer, but by the clerk of the court, and, though its date is the sixteenth of October, 1875, the public is notified that the sale will take place on the eighteenth of the previous month. No doubt this last is a clerical error, but it behooves those who are requiring of others a rigid compliance with the technical formalities of law, to take care that their own proceedings, which they are pleading as *res judicata*, shall not be obnoxious to criticism.

The creditors were not silent while these hurried preliminaries to the sale were being conducted. The present plaintiffs warned the administrator and the purchaser of the consequences of this unseemly haste, but the mock offering and adjudication of the property took place, and the first lot of ground on the inventory, appraised thereon at fifteen hundred dollars, was adjudicated to Ernestine Fontelieu, who is the wife of the administrator's brother, at two hundred dollars. We are not to be understood as intimating that it is improper, much less illegal, for a brother of a decedent to sell through the formalities of the law the property in his fiduciary keeping to another brother or to his wife. Family arrangements for the preservation of property to those who are nearest in blood and sympathy to the deceased are not to be discountenanced, nor to be esteemed even *prima facie* wrongful, but they must be made in subordination to and with strict regard to the rights of creditors. These arrangements are not likely to be successful when the officer of the law, whose function is specially to protect those rights, openly contemns them, and disregards both the form and substance of that law which was made for their conservation.

We are constrained to state our dissent from the proposition enunciated in the opinion of our predecessors, that "it is now well settled that a sale of succession property to pay debts may be validly made for less than two thirds of the appraisement."

The validity of the sale of succession property in no wise depends upon the bid being more or less than *two thirds* of its appraisement. That is the proportion or quantum of the appraisement that must be bid at a sale under execution or executory process. It is a mistake to suppose that all the rules of execution sales apply to those of succession property. The statement of Mr. Hennen, in a modified form, that "the rule of execution sales applies to those of succession property" (Hen. Dig., p. 1492), is an alteration and enlargement of the syllabus of the decision in second Louisiana Reports, to which he refers (*Elliott vs. Labarre*, 2 La. 327), and is not justified by the words or spirit of the opinion of the court

then rendered. These words are that the authority of the judge of probate is necessary to sell succession property, and the person or officer who made the sale did not have it, and Mr. Justice Porter adds, "it may be properly assimilated to the judgment and execution which are a sheriff's authority."

The rule as to the sum necessary to be bid at a succession sale for payment of debts has been widely misunderstood, and variously applied, but there has not been any authoritative declaration, such as that just mentioned, until it was made at the last term of this court. Each one of the authorities there quoted has been examined, and none of them asserts that doctrine, except that in 10 Rob., *Valderes vs. Bird*, p. 398, it is stated that when the sale is made to pay debts the property may be sold for less than the appraisal. Before that decision, this court had said that a sound interpretation of the provisions of our legislation relative to the administration of successions will, in many cases, authorize a departure from the rule which requires the property of minors to bring its appraised value at a sale. *Towles vs. Weeks*, 7 La. 312.

In a later case (succession of Fritz, 12 Annual, 368) the formal enactments of the Code of Practice (articles 990-2) were recited, and these unmistakably prescribe that when the property of a succession is sold to pay debts it must bring its appraised value in the inventory, and, if no bid of that amount be made, the property must be re-advertised, and the second sale must be on a credit of twelve months. At that sale the property can be legally adjudicated at any bid. But that case was clogged with the feature that minors were interested.

The rules providing for the sale of succession property are in many respects different from those that relate to the sale of minors' property, and it is well settled that a sale to pay debts of a succession is not subject to the requirements for the alienation of minors' property when the beneficiary heirs have only a residuary interest to be ascertained by a full and complete administration.

Notwithstanding the unambiguous expressions of the Code of Practice upon this subject, it has in many cases been held that although as a general rule succession property can not be sold, even for payment of debts, for less than the full appraised value at the first offering, yet sales for less than that value will not be disturbed if there be proof that the price at which it was adjudicated is its actual value. And this ruling is now so deeply imbedded in our jurisprudence that it must be adhered to, and will be the guide by which to test one of the objections made to the sale attacked in this case.

It is manifest from what we have here said that we consider the sale of succession property made by the administrator and purchased by the

defendant as null, and that the plaintiffs are entitled to an opportunity to have that nullity declared judicially.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and the case is remanded for proper parties to be made, and for further proceedings therein, the costs of appeal to be paid by the defendant.

No. 980.

A. TERTROU VS. C. C. DURAND ET AL.

The probate court in which a succession is opened has jurisdiction of all suits to destitute the administrator and all demands involving his duties.

Two or more demands, not exclusive of each other, may be properly cumulated in one suit.

A PPEAL from the Probate Court, parish of St. Martin. *Fournet, J.*

Joseph A. Breaux, William F. Schwing, and L. J. Gary, for plaintiff and appellant.

Felix Voorhies and Martin Voorhies, for defendants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff brings this suit in the parish court of St. Martin:

First—To enjoin as extinguished by compensation a judgment for damages for two hundred and fifty dollars, interest, and costs, rendered against him in the same court in favor of the administrator of the estate of Durand, the defendant.

Second—To compel the administrator of said estate and the sheriff to complete and deliver to him a deed of certain property bought by him at probate sale of said estate, made under order and decree of said court, and to obtain possession under said adjudication, and to declare void a subsequent adjudication made to said administrator and his brother of the same property.

Third—To remove said administrator from office for malfeasance in his administration.

The defendant moved to dismiss plaintiff's proceedings and suit on the following grounds:

First—*Lis pendens*, for that plaintiff had brought the same suit in the district court for St. Martin.

Second—That there is an illegal cumulation of demands in plaintiff's petition.

Third—That said injunction should be dissolved, first, for insufficiency of bond; second, because the plaintiff does not allege that his property

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has been seized and advertised, but merely that the sheriff is *annoying* and *harassing* him, and is *about to sell* his property, which is insufficient; third, because the court is without jurisdiction *ratione materie* to declare the nullity of said second adjudication, or to liquidate plaintiff's claim; fourth, because Tertrou's claim, pleaded in compensation of said judgment, is a contested and unliquidated one; fifth, because, even if liquidated, it can not be pleaded in compensation of a judgment for special damages and costs due to third persons.

There was judgment dismissing plaintiff's suit as to his second and third demands above stated for want of jurisdiction. His first demand was rejected on the ground that plaintiff's claim is not such a liquidated claim as can be pleaded in compensation by way of injunction, which the court dissolved, with one hundred and fifty dollars special damages as attorney's fees.

This judgment is clearly erroneous. The parish court having jurisdiction of the settlement of the estate of Durand, and having ordered the sale in question, is the only proper tribunal to compel the administrator and sheriff to do their duty and to make deeds to purchasers, and, incidentally, to adjudge illegal the second adjudication. It is, likewise, the proper and only tribunal to decide upon the demand for destitution of the administrator.

There is no dispute as to its jurisdiction to try the injunction. Hence we find all the matters alleged by plaintiff to be properly cognizable by the parish court, and, therefore, not within the jurisdiction of the district court. Hence the suit in the latter can not be *lis pendens* to this suit, but is *coram non judice*.

We think there is no force in the defendant's objection that the demands of plaintiff are improperly cumulated. There is no inconsistency between them, and there is no good reason why a party having three demands, not exclusive of each other, should not unite them in one suit, and thus diminish litigation. The administrator is the principal and real defendant, the others being only incidentally connected with some of the issues.

We can not pass upon the correctness of the decree so far as it dissolves the injunction and inflicts one hundred and fifty dollars damages, for the reason that the case can not be tried piecemeal. But we must say that the damages awarded, one hundred and fifty dollars, for defending an injunction suit of an amount not exceeding three hundred dollars, is unreasonable and excessive.

Perhaps it would not be amiss for this court to state, with the view of facilitating a settlement of the vexatious litigations in this matter, that this court has recently held, in the case of "Succession of D. Triche," that a special mortgage creditor, purchasing the property subject to his

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mortgage at probate sale, may retain the price until settlement of the estate upon giving security to refund such part as may be found due on final settlement.

This case must be remanded.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that this cause be remanded to the court below to be proceeded with according to law, defendants paying costs of this appeal.

 Nos. 7077 and 7079.

VALERY THIBODAUX VS. J. N. KELLER, AND HOWELL & KELLER VS. VALERY THIBODAUX. CONSOLIDATED.

The tax-sale of property which has been assessed, and sold as the property of one who is not the owner, conveys no title to the purchaser.

The tax-sale of property is fatally defective, if the assessment or the advertisement under which the sale is made, contains no description of the property sufficiently specific to clearly identify it.

The assessment stands in lieu of a judgment. It is the foundation of all which follows, and must contain an accurate and sufficient description of the property, as required by the statute.

The want of such description in either the assessment, the advertisement for sale, or in the tax-title is fatal to such title.

A PPEAL from the Third Judicial District Court, parish of St. Martin.
Train, J.

James E. Mouton and Louis J. Gary, for plaintiff and appellee.

Felix Voorhies and Martin Voorhies, for appellants.

The opinion of the court was delivered by

EGAN, J. The motion to dismiss the appeal is too general in terms, except as to the matter of time of taking appeal, in which we see no error. Neither does there appear to be error in making the appeal returnable to the June term, 1877, instead of 1876. The order was granted on the fifth of June, 1876, and the judge *a quo* expressly states that there was not sufficient time to bring up the appeal to the term beginning on the first Monday of the same month. We think he did not err, and that there do not appear any such irregularities as would authorize dismissal of appeal. The appellee has not named them, and we do not perceive them. The motion is overruled.

Case 7077 is an injunction suit brought by Thibodaux, claiming to be the purchaser at tax-sale of a certain steam-mill, etc., to prevent their removal by the defendants and appropriation to their own use, "because he has been apprised that defendants have expressed their intention to remove the mill, etc., and that they intend to put up the machinery,

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mill, and buildings in the parish of Iberville." He further prays to be decreed the owner of the property.

The defendants moved to dissolve the injunction on several grounds, of which it is only necessary to notice the substantial statement that the allegations of the petition are insufficient to warrant injunction; that there are no facts or acts alleged as the grounds of injunction, nor any acts alleged to be done or about to be done by defendants, but only that the plaintiff has been apprised that they have declared their intention to remove; and the plaintiff does not even allege that he fears and believes that they will attempt or carry out that expressed intention, or that they are about to do so, and for aught the allegations of the petition disclose they might never do so. We do not think these allegations sufficient.

The injunction must be dissolved with one hundred dollars damages as counsel fees against the plaintiff and his surety on bond for injunction, Jean Baptiste Arnas Guidry, *in solido*. The demand to be declared owner of the property by virtue of the alleged purchase at tax-sale will be considered in conjunction with suit 7079, with which suit 7077 was consolidated, and which involves that title also.

Suit 7079 was instituted by Joseph M. Howell and François Nicholas Keller, composing the commercial firm of Keller & Co., domiciliated in the city of New Orleans, to annul and set aside and to have declared null and void the alleged tax-sale to Thibodaux of the steam-mill, buildings, fixtures, etc., in controversy, also to recover possession, of which it is alleged they were illegally deprived, to quiet plaintiffs' title to the property, and for one thousand dollars damages for the illegal acts of defendant, Thibodaux, and the privation of the use and enjoyment of their property.

Of the grounds of objection to the tax-sale it is only necessary to notice these: First—That the property seized and sold for taxes belonged to Keller & Co., and not to J. N. Keller, in whose name it was assessed and as whose property it was sold. It is immaterial to consider whether J. N. Keller and François Nicholas Keller or F. N. Keller are the one and the same, or whether, if the property belonged to F. N. Keller, the assessment in the name of J. N. Keller would suffice. It is both alleged and proved that the property in question belonged not to F. N. Keller or J. N. Keller, but the firm of Keller & Co., of which the plaintiff, Howell, was a member, and which, by all authority, was and is perfectly distinct from either or both the individuals composing it. As the assessment stands in lieu of a judgment, and as, if there be no assessment or judgment against the true owner, there can be no valid sale, this alone would be sufficient to avoid the alleged tax-sale to the defendant, Thibodaux. There are, however, two other objections to the validity of the

tax-sale, each of which is fatal. The first is the want of an accurate or sufficient assessment or description of the property. The only description is as follows:

"State of Louisiana, parish of St. Martin; assessor's list of taxable property of Mr. J. N. Keller; 'description of real estate:' Real estate and machinery of a saw-mill, \$3000."

The location of the real estate or of the saw-mill or machinery is in no manner given, nor is there in the assessment any clue or guide by which it can be ascertained or made certain. There is no date, no description, no boundaries, no location. Such an assessment is no compliance with the requirements of the law, even if made in the name of the true owner. An illegal or insufficient assessment is a radical defect. 15 An. 15; 14 An. 709. Judge Cooley says "assessment is the foundation of all which follows it;" and in making it the provisions of the statute under which it has been made must be followed. This has not been done in the case at bar.

The advertisement of the tax-sale is equally defective and bad for uncertainty. The property is only described as "buildings, saw-mill, and machinery, assessed in the name of J. N. Keller." From this description alone who could tell what was sold and what was bought or offered for sale? How could successful or remunerative bidding be induced by such description or such offering? That it was not is evident from the fact that property proved to have been worth at least three thousand dollars, and estimated by some of the witnesses at over four thousand dollars, was bid in by the defendant, Thibodaux, and adjudicated to him by the tax-collector at the sum and price of \$144 16 $\frac{3}{4}$.

The same defects and uncertainty of description pervade the tax-titles, both of the collector and Auditor, issued to Thibodaux, in which the description of the property conveyed is, if possible, even more defective than in the assessment and advertisement.

This would seem to be commentary enough upon the manner in which the property of citizens has been wrenched from them under the forms of law. It may be well to remark that the land upon which the mill-buildings and machinery in this case were situated did not belong to Keller & Co., or to any member of that firm, but was leased from one Sosthene Leonard at the price of one thousand dollars per annum. They were not real estate at all, nor attached to the realty so as to be immovable, but were personal property; so that here was an additional ground of objection to and even in the assessment. It appears also from the evidence that Thibodaux was in possession of the mill and other property in question under lease at the date of the tax-sale, and availed himself of that circumstance to retain possession under his pretended tax-sale in anticipation of the lapse of the time for redemption

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within which he was not entitled to be put in possession, as his title, even if the proceedings were regular, was only inchoate.

As to the damages other than those allowed as attorney's fees on dissolution of injunction in case 7077, the evidence is not sufficiently full or specific to enable us to award them at this time or in this suit.

It is therefore ordered, adjudged, and decreed that the judgment of the court below in these consolidated cases be annulled, avoided, and reversed; that the injunction sued out by Valery Thibodaux in case 7077 be dissolved, with one hundred dollars damages against himself and his surety on injunction bond *in solido* as attorney's fees for dissolution and trial of injunction in that case; that the demands of said Thibodaux in said suit 7077 be disallowed and rejected; and that plaintiffs in suit 7079, to wit: Joseph M. Howell and François Nicholas Keller, composing the firm of Keller & Co., do have and recover judgment decreeing them to be the owners and entitled to recover and be put in possession of the steam-mill, engine, fixtures, buildings, and other appliances and property attached to and used therewith, sued for in said suit 7079 of the docket of the district court of St. Martin, with the right hereafter to establish and recover any and all damages suffered and caused by the acts and fault of the defendant, Thibodaux, in the premises, by reason of his possession, removal, or appropriation to his own uses and purposes of the said mill, machinery, etc., and any deterioration of value or loss resulting therefrom; and that the alleged tax-sale and title, both from the tax-collector, and the Auditor, set up by him, be annulled and set aside. It is further ordered that said Thibodaux pay the costs of both courts.

No. 975.

ARVENNE HÉBERT ET AL., ADMINISTRATORS, VS. F. D. LÉGE, ADMINISTRATOR, ET AL.

As between parties to a written act of sale, and the heirs of such parties, parol evidence is inadmissible to show the act to be simulated. Only a counter-letter can avail such persons.

Before the administrator of a decedent can show by *parol*, the simulation of a sale made by the latter, he must allege, and prove, that the sale was in fraud of creditors.

A mere trespasser can not put at issue the title of the person who is in possession, as owner, of the property trespassed on.

APPEAL from the Sixteenth Judicial District Court, parish of Vermillion. Mouton, J.

F. R. King, for plaintiffs and appellants.

R. P. O'Bryan and W. W. Edwards, for defendants.

The opinion of the court was delivered by

SPENCER, J. This is an action by plaintiffs against defendants for

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trespass. They allege in substance that the estate of F. E. Dartez, by them administered, is owner and in possession of a certain piece of land, and of certain buildings and fences thereon, as evidenced by two deeds duly recorded, one dated in 1868 by authentic act, and one in 1872 by private signature. By the former Julien Dartez sold to his brother, F. E. Dartez, the buildings and fences on said land, and by the latter the land itself. The defendants are F. D. Légé, administrator of Julien Dartez, and his brother, Fergus Légé. Plaintiffs charge that these parties, with full knowledge of their possession and rights in said property, and in defiance thereof, and notwithstanding their protest, unlawfully entered upon said property, tore down and carried away the fences, and one of the houses, and were pulling down others, and had in part done so. They pray for an injunction, for three hundred dollars actual damages, and five hundred dollars as exemplary or punitive damages, and to be quieted in their title and possession. The injunction was granted.

Defendants answer, first by a general denial, averring that said property did not belong to F. E. Dartez, and denying the identity of the property described in plaintiffs' petition with that described in the deeds. They further aver that even if it be the same property, that said sales were mere simulations, and nothing was ever conveyed or intended to be conveyed by said sales.

On the trial below there was judgment for defendants, and plaintiffs appeal.

Defendants argue in their brief that this court is without jurisdiction; but we think otherwise. Outside of the claim of five hundred dollars punitive damages, the demand is for three hundred dollars actual damages, and to be quieted in their title and possession of the property, which is alleged to be worth more than five hundred dollars.

There are fifteen bills of exception in the record to rulings of the court in admissions and exclusions of evidence, but it will not be necessary to consider them in detail, as there are a few general and fundamental legal principles governing them all.

As between parties and their heirs (other than forced heirs of the vendor) the only admissible evidence of the simulation of a formal written contract is a counter-letter. The retention of possession by the vendor, upon which the district judge bases his decision, is a badge of simulation so far as "respects third persons," and as against such third persons "the parties must produce proof that they were acting in good faith, and establish the reality of the sale." C. C. 2480. But we repeat that as between the parties themselves and their legal representatives the act makes full proof, and its reality can not be disputed by parol. "An administrator can not prove by parol the simulation of his intestate's sale, unless *alleged to be* in fraud, or to the injury of creditors."

14 An. 610. "As between parties or their representatives, parol evidence is inadmissible to show simulation of written acts." 4 La. 167; 3 An. 154; 4 An. 487; 9 La. 566; 3 R. 457.

Creditors, and therefore administrators who represent them, may, of course, *under proper allegations*, attack the debtor's acts as simulated, and resort to every sort of evidence and presumption allowed by law to establish it. But in order to exercise this right, the creditors, or the administrator for them, *must allege* and prove that the act complained of so diminishes or affects the debtor's estate as, if maintained, it will deprive them of their rights. In other words, they must allege that the effect of the act will be to render insolvent the estate of the debtor. They must allege and prove that the debts due by the vendor existed against him at or before the date of the alleged simulated act. C. C. 1993. Hennen's Digest, p. 1123, No. 18.

Now, in the answer of the defendants there are none of these essential and necessary allegations. All the evidence offered by them tending to show simulation, and rejected by the court, and to which their bills of exception were taken, was inadmissible even in behalf of the defendant administrator, because there were no allegations to sustain it. As for the other defendant, Fergus L  g  , he had no capacity or right to raise the question of simulation at all, as he was neither creditor, heir, nor representative of either party to the act. He is sued as a trespasser, and, if such, he can not escape liability by denying plaintiffs' title. "A mere trespasser can not question the title of one possessing as owner." Hennen's Digest, p. 1058, No. 14; 7 N. S. 171; 1 R. 510; 10 R. 99. The defendants' other bills of exception were taken to evidence going to show the identity and locality of the property. It was properly admitted.

On the merits, plaintiffs have, we think, fully made out their case. They have produced formal acts of sale from Julien to F. E. Dartez of the property in controversy, and satisfactorily identified it. They have shown that they were peaceably in possession under those titles, and that although Julien Dartez resided thereon up to his death, he always acknowledged F. E. Dartez as owner, and represented himself as his agent. It is further shown that the defendants, with full knowledge of these facts, and against the protests of plaintiffs, under pretext that the property belonged to the estate of Julien, entered upon it defiantly, and, as they said, "under their own orders," and commenced to pull down the fences, buildings, etc., and did pull down and carry away about two hundred panels of fence and one house, and part of the chimney of another house. Such high-handed modes of enforcing what people may be pleased to imagine or allege to be their rights can not be countenanced by courts of justice, and deserve judicial reprobation. Even if their rights had been undoubted, the law does not tolerate such modes

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of redress; and we are at a loss to understand how the district judge, even under his view, that the sale was simulated by virtue of the presumption of article 2480 of the Civil Code, could have concluded that that justified the violent and tortious acts of the defendants.

The judgment appealed from must be reversed. We think that the plaintiffs have shown damages to the amount claimed, three hundred dollars, and should be quieted in their title and possession of the property.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the injunction sued out be perpetuated, that the plaintiffs recover of the defendants, François D. Lége and Fergus Lége, *in solido*, the sum of three hundred dollars, and be quieted in the title and possession of the property in controversy. It is further decreed that defendants pay costs of both courts.

No. 984.

THE STATE VS. EDWARD HUGHES.

The admissions, confessions, or declarations of a person accused of crime, can not be received in evidence against him, unless the witness who testifies to them, is able to state at least the *substance* of them.

A PPEAL from the Eighth Judicial District Court, parish of Calcasieu.
Hudspeth, J.

Ferreol Perrodin, District Attorney, for the State.

George H. Wells and *F. A. Gallagher*, for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendant is appellant from a verdict of guilty and sentence to hard labor for life on a charge of murder. He assigns as error the rulings of the court on three points, two of which only need be noticed :

First—Thomas McMahon, a State witness, was asked by the district attorney to state a conversation he had with the prisoner relative to the homicide charged. "The witness thereupon saying that he had had such conversation with the prisoner, but that he could not remember said conversation, nor the substance thereof, the district attorney thereupon asked said witness to state to the jury what he could remember of what the prisoner had said in said conversation." The prisoner objected, "on the ground that the confessions or declarations of the

prisoner must be taken together," and that such confessions or declarations were inadmissible, "unless it appears that the witness can state at least the substance of said conversation." The court overruled the objection, and allowed the witness "to testify as to such portions of said conversations as he could remember," stating to the jury that the prisoner's objection "went not so much to the admissibility as to the effect of the testimony."

Second—The witness Landry, sworn for the State, "was asked whether he had ever heard any statements made by the accused, and, if so, what statements he had heard." "The witness stated that he had overheard a remark made by the accused from the jail window in the course of a conversation which he (accused) was carrying on with a little boy outside; that though he had noticed these parties in conversation before he arrived at the jail, and had left them in conversation, he had only heard the single remark to which he testified, while he was passing by the jail, and that he had not heard either the preceding or subsequent portion of the conversation of which this remark formed part." The accused made the same objection, and the court overruled it for the same reason.

We think the court below erred in both these rulings. An admission, confession, or declaration of a party can not be given in evidence against him, unless the witness testifying thereto can at least state the substance of all that was said. See Greenleaf, sections 201, 218, 165; 3 An. 359; 11 An. 49, 736; 3 N. S. 454; 9 R. 146; 9 A. 163; 26 An. 622.

We are not disposed to relax this salutary rule; for although such evidence, when we have satisfactory guarantees of its accuracy, may amount to the strongest proof, yet in a majority of instances, owing to infirmities of memory, or to inattention, or misunderstanding in those called to state conversations with others, it is not very trustworthy. It would be utterly unreliable if fragmentary portions of conversations were received, for then a man might be made to say directly the contrary of what he did say.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and avoided, and that this cause be remanded for a new trial and to be proceeded with according to law.

No. 988.

DOMINIQUE LALANNE vs. FRANÇOIS SAVOY, PRESIDENT POLICE JURY, ET AL.

The police jury of a parish is liable for any actual damage caused to a neighboring inhabitant, by building any work of public convenience that obstructs an unnavigable water-course; but the jury will not, if the work be of great convenience to the inhabitants of the vicinage, be compelled to remove it.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

John N. Ogden and A. Bailey, for defendants and appellants.

Joseph M. Moore, for plaintiff.

The opinion of the court was delivered by

DEBLANC, J. In 1870 a dam was built and became a highway across the mouth of Bayou Toulouse in the vicinity of a small tract of land then belonging to Mrs. Henry Lastrapes. Shortly after the completion of the dam, Dominique Lalanne purchased from Mrs. Lastrapes the land so situated, and—on the tenth of May, 1876—filed this suit.

He alleges that the dam obstructs a natural drain which runs through his land, and he prays that defendants, the local representatives of the parish of St. Landry, be, in their official capacity, condemned to pay him, as damages, the sum of \$2500, and, besides, that they be commanded to remove the aforesaid dam. According to his own declaration, plaintiff has remained for nearly six years, witnessing the gradual destruction of his property.

The district court allowed him, as damages, the full value of his land, and ordered the removal of the dam. From that decree defendants have appealed.

Among the powers delegated to the police juries in the State, one of the most important is that "to cause any water-course which is not navigable to be filled up for the purpose of carrying the public highways over the same, providing no injury be thereby occasioned to the neighboring inhabitants." Revised Statutes, section 2743, No. 13.

Bayou Toulouse is not navigable; and, so far as relates to its condition, it is one of those that may be filled up, and over which the police jury had the right to carry the public highway.

In the language of the statute, have the neighboring inhabitants suffered from the action of the police jury?

Of the proprietors of that section of the parish, only one is before the court, and that one acquired the land he owns in that locality after the building of the dam. He was sworn as a witness in his behalf, and among other things he said: "Before buying the land I visited it several times during low water, in the summer and fall. I know the Toulouse

swamp; the bayou is the only drain for that section. With the exception of fifteen acres, the water thrown on my land has killed all my timber."

This is his own acknowledgment; he knew the swamp; he crossed the dam, and by merely casting a look on the ground which extends from the dam to the swamp he could have ascertained that then, as before, his land was subject to overflow. Nor is this all. His vendor and the inhabitants of that locality were certainly informed that, by virtue of an ordinance of the police jury, a levee would be erected across the Toulouse, and, nevertheless, they did not oppose any objection to either the project or its execution.

Can the inhabitants of a State, a parish, a city, a village, acting through their delegated agents, build causeways, bridges, and dams, and thereafter—denying the delegated authority—claim damages resulting to them from the acts of their own agents, from acts acquiesced in and ratified by an unbroken silence of nearly six years? They may; but on the ground, and none other, that in a matter of public necessity or public convenience, a right to them belonging has been abridged or destroyed; and that—on that account—they are entitled to a compensation proportioned to their loss.

Adopting that rule and applying it to this case, what is the extent of the loss suffered by plaintiff? Has he lost his land? He has not; but let us suppose he had. What is its value? He said twenty-five dollars, a disinterested witness said twenty-five cents, defendant, from two to three dollars an acre. The only value of that land consists of its timber, and the amount allowed to plaintiff by the lower court covers all that the land is worth, and, necessarily, the loss actually suffered.

We refrain from expressing any opinion as to the nature and extent of *servitude* which may be due from one another by estates situated in the *middle* or on the border of swamps, and on which, at regular periods, the water comes and flows from and in every direction. We leave for the future the discussion of that important question.

As to the plaintiff, he retains his land, on fifteen acres of which the trees have not been affected, and—besides—he will receive the entire value of the land. He can not ask, he can not expect, more; with that, his right of action against the parish is exhausted.

As to the dam, it may be an object of general utility, and, as regards its removal, we differ in opinion with our respected brother of the district court. If in so doing we are mistaken, our error can easily be corrected by the interested parties through the action of their police jury.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, but so far only as it orders the removal or opening of the dam constructed at the mouth of Bayou Toulouse, and that in other respects said judgment is affirmed;

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the costs of the lower court to be paid by defendants in their official capacity, the costs of the appeal by plaintiff.

DISSENTING OPINION.

EGAN, J. I concur in so much of the decree as reverses the judgment of the lower court which directed the demolition of the dam in question. I dissent from so much of the decree of this court as affirms the allowance of damages by the court below to the plaintiff in this case. The right to damages, if any, existed in favor of the vendor of the plaintiff, the person who owned the land at the time the dam was constructed and the bayou stopped. That right is not in my opinion one which runs with the land, like a servitude, in favor of any future owner. If the bayou constituted a servitude before, it ceased to do so after, the construction of the dam under authority of the police jury, and no other right remained except to compensation to the then owner. If the plaintiff's vendor did not lay claim to damages herself, then plaintiff, to whom she only transferred the land with the dam already built, and to whom she did not transfer her right to compensation or damages growing out of its construction, can not recover them in her stead. This would seem the more just and reasonable, as, if there was damage or apprehension of damage from the stoppage of the bayou and construction of the dam, the plaintiff doubtless got the benefit of it in his purchase at a correspondingly diminished price.

MARR, J. I concur in this dissenting opinion.

No. 985.

ZÉNON BROUSSARD VS ALCÉE DUPRÉ, ADMINISTRATOR.

Judgments of the courts of the country parishes only take effect from the last day of the term of court at which they were rendered, no matter on what day of the term they were signed. Hence, prescription of such judgments only begins to run from the last day of the term in which they were rendered.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Kenneth Baillio*, Judge *ad hoc*.

A. Bailey, for plaintiff and appellee.

Garland & Dupré, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues to revive a judgment rendered in February, 1867, in the parish of St. Landry. The judgment was signed

on the twelfth of that month. The term of court at which it was rendered closed by adjournment on the eighteenth of same month.

Citation in this suit for revival was made on the fifteenth of February, 1877. The prescription of ten years is pleaded.

Judgments rendered in the courts of the country parishes have effect only from the last day of the term, whatever may be the day on which they shall have been signed. Code of Practice, art. 555.

The prescription of ten years will not apply to this suit for revival, unless the time be reckoned from the day when the judgment was signed. The defendant urges that the day when it was signed is the day of its rendition, but that is obviously inaccurate, because a judgment is rendered always before it is signed, and in some of the country parishes the excellent practice prevailed and now prevails of signing all judgments rendered during the term on the last day thereof, and not before.

The judgment of 1867 had effect only on and from the eighteenth of February of that year. It could not have been used as a judgment until that time, and that must be the day when it commenced its existence, so to speak, as a judgment. The legal duration of its life was ten years from its birth. To prolong that life, a citation for revival must be served before the expiration of the period limited for its continuance, and that was done in this case.

The term "rendition," employed in the statute of 1853, would be more naturally interpreted to mean the act of rendering a judgment than the act of signing it. But the general provision that all judgments rendered in the courts of this State, other than those of the First Judicial District, take effect only from the last day of the term of the court at which they are rendered fixes the time when the judgment is complete, and indicates the starting-point where prescription begins to run against them.

The judgment of the lower court was in accordance with these views, and it is therefore affirmed.

No. 927.

SUCCESSION OF CARMELITE PLANCHET. OPPOSITION OF V. VEAZEY.

Oppositions to the account of an administrator, and the homologation of the account, are parts of one suit, and should be passed on in *one* decree, and not in separate decrees.

No defect in a premature appeal taken from an interlocutory decree in a case, can prejudice the appeal subsequently taken from the final judgment in the case.

It is improper to appeal from a judgment by motion in open court, except during the term of the court at which the judgment was rendered; but if the appeal is thus taken at a *subsequent* term, and the appellee appear and file an answer, the defect will be cured, and the appeal maintained.

Property purchased during marriage, whether in the name of the husband, or the wife, becomes community property.

The surviving husband is absolute owner of one half the community property, and life-time usufructuary of the other half, which latter half the heirs of the deceased wife can not set up any claim to during his life.

A PPEAL from the Parish Court of the parish of Vermilion. *Kibbe, J.*

F. R. King, for opponent and appellant.

R. P. O'Bryan and Mouton & Debaillon, for administrator.

The opinion of the court was delivered by

MARR, J. Carmelite Blanchet, wife of Valcourt Veazey, to whom she was married without nuptial contract, died, intestate, at the matrimonial domicile, in Vermilion parish, in February, 1864, without ascendants or descendants, her legal heirs being her brothers and sisters and the descendants of deceased brothers and sisters, her husband surviving. One of the heirs administered; and he caused all the movables and immovables which were in the possession of the spouses at the time of the death of the wife, to be inventoried, and all the movables to be sold as belonging to her succession.

In 1874 Valcourt Veazey obtained an order from the parish court requiring the administrator to account. On the sixteenth of October, 1874, he filed a "tableau of debts and charges and of provisional settlement in the succession of Carmelite Blanchet," and he prayed that the heirs be cited, and that the tableau be homologated after due publication.

Veazey opposed this tableau, alleging that the charges were excessive, and that he was entitled, after the payment of the debts, to one half the community as owner, and to the usufruct for life of the other half.

The opposition was maintained in part, and the court decreed that all the movables inventoried and sold in the succession, except certain objects which were proven to have belonged to the wife at the time of the marriage, and a tract of one hundred and sixty acres of land purchased during the marriage, belonged to the community; that certain amendments and corrections of the tableau should be made, and that all the expenses and charges of the administration should be borne by the com-

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munity. The court further decreed that, "as thus amended, the tableau be *then* homologated."

From this judgment, which was rendered on the third of May, 1875, the opponent and the administrator appealed, but the appeal was not prosecuted beyond the motion made in open court.

At the next term, in June, 1875, the court rendered a final judgment homologating the tableau as corrected and amended by the judgment of the third of May. Thereupon the opponent, by motion in open court, appealed from this judgment, and gave the requisite bond; and he also, by motion, appealed from the judgment of the third of May, and gave bond, both appeals being made returnable to the ensuing June term of this court.

The administrator, appellee; moves to dismiss the appeal, on the ground that the judgment was rendered and signed at the May term, and the appeal could not be taken by motion at the June term. Referring to his motion, which is applicable only to the judgment of the third of May, and in the event that it be maintained, he pleads that judgment as *res adjudicata*, and this is followed by an answer to the appeal praying an amendment of the judgment in several important particulars.

The proceedings in this case are irregular and improper, and we think it not amiss to call the attention of the parish judges to what we consider the correct practice in such cases.

When the representative of a succession files an account he is plaintiff. The burden is on him to prove and establish the correctness of the account, and it can not be homologated without such proof. If no opposition is made, the proof is introduced, and the whole proceeding is *ex parte*, just as in ordinary cases where judgment by default has been taken, and is to be confirmed. Where opposition is made, whether by one person or by several persons separately, or by a number of persons who unite, all the oppositions constitute so many answers or pleas to the same suit and demand, and they must all be tried as one case, and one judgment must be rendered. That judgment will pass upon and dispose of all the oppositions and the account; it will correct and amend the account so far as the oppositions are maintained, and, as thus corrected and amended, will approve and homologate it. Or, if the oppositions are not maintained in whole or in part, the account will be homologated so far as the several items are proven and established to the satisfaction of the court.

It was improper for the court in this case—it will be irregular and improper in any similar case—to take up and try the opposition as a separate case, pronounce a judgment disposing of the opposition, and, at a subsequent term, or at the same term, to render another judgment homologating the account.

The motion to dismiss can not prevail. The judge of the parish court treated the judgment of third of May as interlocutory, and the final judgment homologating the account was based upon that judgment, which, in fact, disposed of the whole case. The appeal from the judgment of homologation brought up the entire case, and the other appeal was not necessary, nor can it in any manner prejudice the rights of opponent. The first appeal in May was premature, and it was evidently taken merely as a precautionary measure. The appeal from the judgment of homologation was in all respects regular, and the only irregularity in the appeal at the June term from the judgment of the third of May is that it was taken by motion instead of by petition and citation. The whole object of citation is to bring the appellee into court; and if he appears for any other purpose than merely to move to dismiss the appeal, that object is fully accomplished. The answer to the appeal cures the want of citation, and the cause must be heard and determined on the merits.

And here we take occasion to say that the motion to dismiss ought, regularly, to be determined before an answer to the appeal is filed. The limited duration of the terms of this court in the country districts makes it necessary to hear the whole case on the motion and the merits at the same time. In order, therefore, to guard against the waiver which logically and legally results from the filing of an answer, the proper practice is to reserve, at the beginning of the answer, the benefit of the motion, and to set out in the answer that it is to be used only in the event of the overruling of the motion.

The administrator reserved a bill of exceptions to the ruling of the parish judge admitting in evidence a notarial act of the twenty-seventh of December, 1853, by which Telesphor Landry sold and conveyed to Valcourt Veazey one hundred and sixty acres of land which, by act of eleventh July, 1853, he had sold and conveyed to Carmelite Blanchet. She joined in this act of the twenty-seventh of December, in which it is declared that the sale and conveyance to her of the eleventh of July were null and void. The act was clearly admissible. It was the best evidence that the conveyance had been made to the husband; but it in no manner created any new right in him, nor did it divest any right of the wife. The sale in July, during the marriage, did not make the land the separate property of the wife, and the sale of the twenty-seventh of December did not make it the separate property of the husband. Whether the title stands on the conveyance to the wife of the eleventh of July, which she afterward declared to be null and void, or on the conveyance to the husband of the twenty-seventh of December, the property belonged to the community, and the community was the debtor of the wife for so much of her separate means as was used in paying the price.

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The inventory shows slaves valued at \$4100, lands valued at \$4600, a note for \$300, silver and gold coin \$418 30, Confederate money, available because used in paying Confederate tax of equal amount, \$112, and movable effects which were sold for \$7056 67. The slaves, of course, were of no value, and the lands have not been sold. The proof is clear that three hundred acres of the land and the slaves belonged to the wife at the time of the marriage, and that one hundred and sixty acres of the land belonged to the community. Part of the movables sold belonged to the community, and part to the wife alone.

It was proven that the means of the wife to the extent of five hundred dollars were used in paying for the one hundred and sixty acres of land belonging to the community; and that the wife sold a tract of land in December, 1853, to Onézime Trahan for twelve hundred dollars, cash, which she gave to her husband to keep for her. It does not appear what became of this money; but there is nothing tending to show that the husband used it, either for his own purposes or for the benefit of the community. Both husband and wife were industrious and economical, and he acquired no property, nor does any thing indicate any expenses of living beyond the income from her loom, the daily sales of vegetables from the garden, the crops of cotton and corn made by the labor of the slaves and of the husband, and occasional sales of cattle. We agree with the parish judge that the proof does not suffice to charge the community with this sum.

In June, 1865, the administrator filed what he called a tableau, which was, in fact, merely a statement of debts and charges, without any reference to the assets. The items foot up \$1440 22; or, filling a blank with amount of Guegnon's bill for printing, \$270 40, the amount would be \$1710 62. None of these items are debts of the community, except the physician's bill, eighty dollars, druggist's account, twenty-eight dollars, and Confederate tax, \$112.

The account or tableau filed in October, 1874, begins with debts as per former tableau, \$1710 63; and subsequent charges, including \$300 retained by the administrator for future charges, foot up \$3931 72, though when the deductions are made, preparatory to a distribution, this amount is set down at \$3971 72, and the balance for distribution is only \$2438 36.

Of all the items charged in this account, we find none which bear upon the property of the community, except such portion of the taxes paid as were levied on the one hundred and sixty acres of land belonging to the community. The property taxed was four hundred and sixty acres of land, and the entire amount charged is \$313 10, which gives for the one hundred and sixty acres, \$108 90.

The judge of the parish court found that of the movables sold by the administrator, objects which brought \$2498 28 had been identified and

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proven to have belonged to Carmelite Blanchet at the time of the marriage; and he decided that this amount should be deducted from the \$7056 67, and that the remainder belonged to the community. We agree with him in this, and shall affirm the judgment to that effect.

He also decided that the community was to be charged with five hundred dollars, paid on account of the price of the one hundred and sixty acres of land, and we find this correct, and shall affirm the judgment to that effect.

He also decided that the one hundred and sixty acres of land, the money on hand, and the note for three hundred dollars belonged to the community; and that the community was not chargeable with the twelve hundred dollars, price of land sold to Trahan by the wife in December, 1853; and we find the judgment correct, and shall affirm it to this extent, also.

The parish judge also rejected certain items in the account, and decided that the whole amount allowed was a proper charge against the community. In this we think he erred; and, as we are compelled to remand the case, we shall reverse his judgment, except so far as indicated above.

We have earnestly desired to render a final decision in this case, and to close this prolonged litigation, but it is not possible for us to do justice to the parties with the proofs in the record.

By law, at the death of the wife, the husband became absolute owner of one half the effects and property of the community, and usufructuary for life of the remainder. The community owed no debts, except for the medical and drug bills \$108, Confederate tax \$112, and \$500 due the succession of the wife. There was a sufficiency of Confederate money in the house to pay this tax, and it was used for that purpose; and the \$418 30 in gold and silver coin would have paid the medical and drug bills, and have left ample means to defray the funeral expenses.

So far as the community property was concerned, the husband was in possession of right, as head of the community, and the heirs were not entitled to any part of it, except the one half of the residuum after paying the small amount of community debts; and this half they could not have claimed during the life of the husband, the legal usufructuary.

We find the charges in the accounts filed by the administrator most extraordinary. The succession owed nothing but for funeral expenses, and the property was sold on a credit of one, two, and three years. Dissecting the accounts, we find charged in them for attorney's fees \$848 75, for commissions for collecting \$154 58, printing bills \$270 40, clerk's fees \$219 90, recorder's \$132 50, administrator's commissions \$272 94, keepers of the property and guardian of the seals \$374, making \$2273 07 of charges, without the slightest necessity or justification. We can not

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allow such wrongs to pass, with the apparent approbation of silence; and we are somewhat surprised to find that the opponent was allowed \$320 as keeper of the seals for one hundred and sixty days.

It was the right, and it was the duty of the husband to have paid the debts of the community, to have had an inventory taken, and to have retained the entire community property in his possession as owner of one half, as usufructuary of the other half, securing to the heirs of his wife their half at the expiration of the usufruct, in the manner pointed out in the Code.

This is no longer possible, except with respect to the one hundred and sixty acres of land, purchased of Telesphor Landry, on the twenty-seventh of December, 1853, which the opponent is entitled to take and hold and use, one half as owner, the other half as usufructuary.

With respect to the movables, all that can be done is to ascertain what should be reasonably deducted for the expense of selling them, and to charge against the community the community's share of these expenses, and to have the remainder paid over to the opponent, one half as owner, the other half as usufructuary; and for this latter half he will give security as required by the Code; or, failing to do this, the money must be put out, either with the consent of the heirs or by the authority of the judge of the parish court, at interest, and secured; the interest to be paid annually to the usufructuary, and the capital to be paid to the heirs or their legal representatives at the expiration of the usufruct.

The administrator must be required to make a new account, in which he will deduct from the sales, say the \$7056 67, the \$2498 28, which belongs to the succession of the wife. To the balance he will add the \$300 note of Frank, and the \$418 30 in coin. This sum will represent the gross amount of movables belonging to the community. From this sum he will be allowed to deduct such part of the expense of selling the movables as should be borne by the community; that is, where the whole expense of selling these effects is ascertained, it will be apportioned between the community owning \$4558 39, and the succession of the wife owning \$2498 28 of these effects. There will also be deducted the \$500 paid out of the wife's means for the one hundred and sixty acres of land, \$108 for medical and drug bills, and \$108 90 for taxes chargeable to the community property. The \$112 Confederate money, and \$112 Confederate tax, will be omitted, because the one extinguishes the other. When the amount is thus ascertained, the one half will be paid to Valcourt Veazey as owner, and the other half be delivered to him as usufructuary in the manner already stated.

The succession of Carmelite Blanchet will consist of the three hundred acres of land owned by her at the date of the marriage, the \$2498 28, her share of the movables sold, and the \$500 due to her by

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the community, as just stated. Her half of the community will also be part of her succession, but it can not be administered or taken possession of by the heirs until the termination of the usufruct of Valcourt Veazey.

The administrator will account to the heirs for the effects of the succession, and the costs of administration, except the part of the expenses of selling, to be borne by the community, as above stated, will be chargeable to the succession alone.

It is therefore ordered, adjudged, and decreed that so much of the judgment appealed from as fixes the interest of the succession in the movables sold at \$2498 28, and recognizes the right of the community to the remainder, so much of said judgment as awards to the community the other personal and movable property, and the one hundred and sixty acres of land purchased during the marriage, and so much of said judgment as charges the community with the \$500 paid for the one hundred and sixty acres of land, and so much of said judgment as declares the community not liable for the \$1200, price of land sold by Carmelite Blanchet to Onézime Trahan, be and the same is hereby affirmed; that the said judgment be in all other respects avoided and reversed; that the cause be remanded for further proceedings as herein directed, and according to law; and that the costs of the court below and of this appeal be borne by the succession of Carmelite Blanchet.

No. 882.

ELIZABETH GIBBS ET AL. VS. JOSEPH A. LUM & Co.

A minor can not sue his tutor for what may be due him by the latter, nor sue to subject to his claims his tutor's property, during the existence of the tutorship. An heir who has attained majority can not subject any part of his tutor's property to the legal mortgage he may have on it, until he has first obtained a judgment of liquidation and settlement of his claims against the tutor. The probate, and not the district court of the parish, has jurisdiction of suits by heirs against their tutors for settlement of tutorship affairs.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J.*

Martel & Hudspeth, for plaintiffs and appellees.

Lewis & Brother, for defendants.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MORGAN, J. An appeal was granted in this case on motion of defend-

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ants, upon their furnishing "bond in the sum of one hundred and fifty dollars if for a devolutive appeal, and according to law if suspensive."

Motion is made to dismiss the appeal on the ground that the bond furnished is not such a bond as the law requires.

The bond is as follows:

"Know all men by these presents that we, —, as principal, and Thomas H. Lewis, as security, are held and firmly bound unto —, clerk of the district court in and for the parish of St. Landry, his heirs, executors, administrators or successors, in the sum of — dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents.

"Dated on the twentieth day of February, 1875."

"Whereas, the above-bounden — appeal from a certain final judgment rendered against them in the district court in and for the parish of St. Landry, in favor of —, in suit No. 12,262 of the docket of said court, entitled 'Elizabeth Gibbs, in her own right, et al. vs. J. A. Lum & Co.,' now, therefore, the condition of the above obligation is such that if the said — shall prosecute this — appeal and shall satisfy whatever judgment may be rendered against —, or if the same shall be satisfied by the proceeds of the sale of — estate, real or personal; if — be cast in the appeal, then in that case the above obligation to be null and void, otherwise the said security shall be liable in — place.

"Clerk's office, parish of St. Landry.

"(Signed)

THOMAS H. LEWIS,

"Attorney in fact for J. A. Lum & Co.

"(Signed)

THOMAS H. LEWIS, Security."

The judgment was signed on the twentieth of February, and the bond was given on the same day. It must be considered with reference to the order of appeal, and must be taken as a bond for a suspensive appeal.

The motion to dismiss is therefore denied.

ON THE MERITS.

The opinion of the court was delivered by

MORGAN, J. Joseph Gibbs, Sr., owed Robert Henderson fifteen hundred dollars. To secure this indebtedness, Gibbs, on the twelfth of February, 1857, mortgaged a certain piece of property situated in the town of Opelousas. Robert Henderson died. His estate was inherited by his father, William Henderson. Forming part of his inheritance was the above-named indebtedness.

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William Henderson died. He left to the minor children of Joseph Gibbs and to his wife, Bridget M. Carroll, the debt due by Joseph Gibbs. He appointed Joseph Gibbs his executor:

Mrs. Gibbs died on the twenty-second of February, 1864, leaving two minor children. She was in community with her husband. Her estate consisted in her interest in the community which existed between her husband and herself. The community owed no debts. On the second of February, 1866, Joseph Gibbs was appointed natural tutor to his minor children. As natural tutor he retained in his possession the property which composed the community which existed between himself and his wife and administered the same.

An abstract of the inventory of his wife's property was recorded in the mortgage record of the parish of St. Landry, the parish of domicile, prior to the first of January, 1870, to wit: on the ninth of September, 1869.

William Gibbs died without issue prior to the death of his mother. Consequently, his estate went one half to his father and mother and one half to his brothers and sister.

The mortgage executed by Joseph Gibbs in favor of Robert Henderson on the twelfth of February, 1857, has never been reinscribed.

On the twelfth of June, 1857, Joseph Gibbs executed a note for one thousand dollars, payable twelve months after date, to J. A. Lum & Co. On August, 1, 1857, Gibbs, to secure payment of this note, mortgaged all his property, including that upon which the Henderson mortgage bore. In addition to the note for one thousand dollars, Lum & Co. held his note for \$172 35, dated June 1, 1858, payable on demand. This note was not secured by mortgage.

On the nineteenth of January, 1866, Lum & Co. instituted suit on these notes, and prayed for a foreclosure of the mortgage. Gibbs confessed judgment. The judgment was recorded on the first of March, 1867.

On the twenty-ninth of July, 1872, execution issued. Under the execution the sheriff seized and offered for sale the property which had been mortgaged to Henderson. He also seized and offered for sale the property which belonged to the community which had existed between Jos. Gibbs and his wife.

Elizabeth Gibbs, in her own right, she being now a major, and Jos. Gibbs, tutor to Joseph Gibbs, Jr., filed a third opposition, in which they claim the proceeds of the property then about to be sold, to the amount of \$3625, with interest on \$1500 from July 12, 1856, at eight per cent per annum, and with interest at five per cent per annum on \$2125 from the twenty-second of February, 1864, as belonging to them.

Their opposition is based upon the facts above set forth.

At the first offering the property was not sold. At the second adjudication it was sold on a twelve-months bond for \$2350.

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Lum & Co., the defendants herein, pleaded—

First—That plaintiffs have no claim on the property seized. They admit that they once had a conventional mortgage on a part of it (that portion which was mortgaged to Henderson), but they say that this mortgage was not reinscribed until the first of March, 1867, and that it is therefore prescribed.

Second—That the property of Mrs. Gibbs was in the possession of Joseph Gibbs at the time it was seized, and that the recording of the abstract of the inventory of the estate left by Mrs. Gibbs conferred no rights upon Gibbs's property.

After answering, Lum & Co. excepted to the petition, because "Joseph Gibbs, tutor, has never rendered an account of the tutorship, and that until his account was rendered the mortgage claim of plaintiffs, if any, could not be ascertained." This exception was cumulated and tried with the merits.

Then Elizabeth Gibbs amended her petition, pleading that Lum & Co.'s claim was prescribed at the time they instituted suit, but that Gibbs, with intent to defraud her and her co-heir, in collusion with Lum & Co., confessed judgment; that at the time the judgment was confessed she was a minor; and that her interests could not be prejudiced by the illegal act of her tutor.

R. H. Littell, under-tutor to the minor, Joseph Gibbs, intervened and set up the same plea.

To both these last appearances Lum & Co. excepted upon the grounds:

First—That their judgment could not be attacked collaterally; and

Second—That plaintiff and intervenor, claiming proceeds of a sale in execution of the defendants' judgment, are precluded from contesting the regularity and validity of the sale in any way whatever.

The exception was overruled, and both amendment and intervention allowed.

There was judgment sustaining the plaintiffs' opposition in so far as related to their claim for fifteen hundred dollars on the Henderson mortgage, less one fourth of the share of the deceased minor.

There was error in the ruling of the judge on the exceptions to the amendment and the intervention. A judgment can not be attacked collaterally. Neither can a party claim the proceeds of a sale resulting from a judgment and at the same time say the judgment is a nullity. We are thus spared the necessity of inquiring as to the verity of the charges made by the children that their father has conspired and colluded with a stranger to defraud them of their rights. The debt due by Joseph Gibbs to Robert Henderson, contracted during his marriage, was a community debt; so was the debt due by Gibbs to Lum & Co.

The donation of the Henderson debt to Gibbs's children placed their

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father and mother in the same position toward them that they were in toward Henderson. In other words, it was the debt to Henderson due to Gibbs's children. In this view it must be regarded in the same light that it would have been if the donation had been made of a debt due by a third person, secured by mortgage; and the same rule would apply with regard to the prescription of the mortgage. Understand that we are treating of a conventional mortgage, not debt. The debt may exist, and the mortgage be perempted. There is no difference between a conventional mortgage in favor of a minor and a conventional mortgage in favor of a major. Both are governed by the same rules, and both are prescribed by the same law. A mortgage, not reinscribed, held by a major, is prescribed in ten years. It is prescribed against a minor in the same time.

The mortgage granted to Henderson, through whom the plaintiffs claim, was recorded on the tenth of January, 1857. It has never been reinscribed. This suit was instituted in September, 1872. At that time, under the conclusion expressed above, the mortgage was perempted.

Lum's mortgage was recorded in August, 1857. Judgment was rendered upon it on the first of March, 1867. The judgment was recorded. From the date of the recording of the judgment it became a judicial mortgage. When execution issued the original mortgage was perempted. But the judicial mortgage took the place of the conventional mortgage, and the judicial mortgage was in force when the *fieri facias* issued. But the opponents contend that when the judgment was rendered the note which was secured by mortgage, and the one which was not, were prescribed, and that as the notes were prescribed, therefore no judgment should have been rendered upon them. If prescription had been invoked, perhaps it would have been fatal to the plaintiffs' claim. Prescription is a personal plea. It may be waived, expressly or tacitly. Here there was a confession of judgment. It was, therefore, necessarily waived. It is, however, contended that the waiver could not be made to the prejudice of the rights of third parties. In the first place, no rights of third parties were prejudiced, for the third parties here were the representatives of Henderson, and Henderson's mortgage was perempted before the confession of judgment was given. In the next place, the defendant in that suit was authorized to waive prescription. The debt for which he was sued was a community debt. As such he controlled it. The precise point was lately decided in a case recently decided in New Orleans, the title of which now escapes our memory.

The conclusion to which we have come upon the merits renders it unnecessary that we should express any opinion as to the exception which the defendant took to the proceeding.

It is therefore ordered, adjudged, and decreed that the judgment of

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the district court be avoided, annulled, and reversed, and that the plaintiffs' third opposition be dismissed, the costs in both courts to be paid by them.

ON REHEARING.

The opinion of the court was delivered by

SPENCER, J. Our predecessors granted a rehearing in this cause, at the June term of 1876, on application of plaintiffs.

We do not think the rehearing extends to the decision on the motion to dismiss. But, if it does, we think that it is correct, and ought not to be disturbed.

Most of the facts material to the case are stated in the former opinion of this court, and need not be again recapitulated.

The defendants excepted to the third opposition of plaintiffs on the ground that the opponents could not proceed to enforce their claims and mortgages against their tutor or his property until the amounts due them had been ascertained and liquidated on final account of the tutorship. It seems that one of the opponents, Elizabeth Gibbs, had attained majority, but the other, Joseph Gibbs, Jr., was a minor still at the date of filing this suit. It is well settled, and, indeed, elementary, that a minor can not, *pending the tutorship*, execute his claims against his tutor; that such demands become executory only at the expiration of the tutorship. Being under tutorship, any moneys recovered would of necessity go immediately back into the hands of the tutor, who would thus as it were have money taken out of one pocket and immediately put back into another. He would be enforcing the collection of a debt from himself, and the very act of, paying the debt would, instead of extinguishing it, give it life anew.

This court well said in 12 An. 361: "It may well happen that when the minors attain majority the tutor shall owe them nothing; that all may have been consumed in payment of debts, expenses of education, etc.; or it may be that the minor may die before attaining majority, and that the whole, or a part of the indebtedness of the tutor, may be thus extinguished by confession.

"When the minors shall have attained the age of majority, or shall be emancipated by marriage, or when the tutrix shall be from any other cause compelled to account, and the claims of her children against her shall have been liquidated, and the balance in their favor ascertained, the recourse of the children will be, first, against the property then in possession of their mother and tutrix, and it may be that she will have property sufficient to satisfy their claims. But if not, then the minors will

have their recourse against the third possessors of property alienated by their mother since the date of her appointment as tutrix."

To allow the claims of the minor to be executed against his tutor's property, pending the tutorship, would be to open the door to great frauds on minors, and put it in the power of the tutor to destroy the security which the law so zealously preserves for the minor's benefit; for all the tutor would have to do would be to enforce or have enforced against himself the claims of his ward, and then pocket the proceeds of the sale of his own property so sold under the minor's claims.

These views are, we think, conclusive against the right of the minor, Joseph Gibbs, Jr., to intervene and claim any part of the proceeds of the property sold in this case.

As to Elizabeth, having attained her majority, she stands in a somewhat different position. But we think that until she has, by proper proceeding in the probate court, ascertained and liquidated, contradictorily with her tutor, her rights and claims against him, she is not in position to enforce them. It is manifest that liquidation can not be had in this case before the district court, because the proper parties are not before it. Her demands must be established against her tutor and father. He must, therefore, be a party defendant, and there must be proper pleadings to serve as the basis of a judgment. In this case *her tutor* is not a party to this suit. The tutor of Joseph Gibbs, Jr., or rather Joseph Gibbs, Jr., by *his* tutor, is a co-plaintiff with Elizabeth. There is, and can manifestly be, no proper issue for settling her claims against her tutor. Again, the district court could not take jurisdiction of a demand by a minor against his tutor for liquidation of the affairs of the tutorship. In the case before us, it appears in evidence that Elizabeth Gibbs has commenced in the parish court, and that there is now pending therein, a suit against her tutor for settlement of his account of tutorship. That court is certainly the proper forum for such a contest, as it has exclusive probate jurisdiction.

The law manifestly did not vest both the district and parish courts with such jurisdiction, and such an interpretation would lead to endless confusion and conflicts of jurisdiction, since in this very case, where the district court has adjudged plaintiffs to be large creditors of their tutor, the parish court may render a very different judgment. We, therefore, think that so far as relates to any claims of opponents, under their legal mortgage, their demands should be dismissed, reserving to them their right to pursue hereafter such recourse on the property sold as the law permits. It is, we think, indisputable that they have preserved by proper registry a legal mortgage upon the property of their tutor to the extent, at least, of \$4250.

The law prior to January 1, 1870, gave them a legal tacit mortgage

without registry. The act of 1869 provided that this legal mortgage could be preserved by recording "an abstract of the inventory," and that its recordation "shall operate a mortgage on all present and future property of the tutors, *for all their acts*, until they are relieved," etc.

The conventional mortgage of Lum & Co. having perempted, their judicial mortgage is inferior to this legal mortgage, and a sale under the Lum debt did not divest the minors' mortgage, and the property sold is still liable for such amount as on final settlement may be due them.

So far as concerns the opponents' claim under the conventional mortgage to Henderson, their rights are clearly lost for want of reinscription; but it is manifest that, as this loss is the direct result of the negligence or fraud of their tutor, they are his creditors for its value, and that their claim in this regard is protected and preserved by their legal mortgage, which secures them against "all acts" of maladministration of their tutor. It will, therefore, be a proper charge against the tutor in the settlement of accounts, but can not be enforced now, and in this case, as a conventional mortgage right.

It is proper here to remark that, the opponents' rights not being affected by the sale under the Lum judgment, we do not see that they have any interest in contesting it. But if they had, we do not think it could be successfully done. A debt barred by prescription still exists until it is pleaded; and even afterward there is always a natural obligation remaining which is a good consideration for a new promise to pay. It is not necessary for us, under the view we have taken, nor, indeed, under the facts of this case, to express any opinion upon the proposition announced by our predecessors in this case, that the surviving husband may after the death of his wife and dissolution of the community revive by acknowledgment a debt already prescribed, so as to make it exigible upon the assets of the community, including the wife's share thereof, since, as we understand the record, only the husband's interest in the community property was sold. And whether so or not, the minors, not being parties to the sale, would not be bound by it if their share of the community was not legally liable, upon which, as stated, we express no opinion.

It suffices for the purposes of this case, that the Lum judgment was valid against Joseph Gibbs, Sr., and this seems to be conceded.

It is therefore ordered, adjudged, and decreed that the judgment of this court heretofore rendered be so amended as to reserve any rights opponents may have under their legal mortgage to hereafter pursue by hypothecary action the property sold under execution in case of J. A. Lum & Co. vs. Joseph Gibbs, Sr., and that in other respects said decree remain undisturbed.

Mrs. Nancy M. Fraser vs. Zylicz.

No. 951.

MRS. NANCY M. FRASER, WIFE, ETC., VS. PAUL ZYLICZ.

The tutor of minors is a proper party to sue for the removal of an under-tutor. Where the tutor of minors, who has been appointed by the probate court of one parish, removes with the minors and resides in *another* parish, the probate court of the latter parish will have jurisdiction of a suit brought by him to remove an under-tutor.

Property of minors, *unless sold to pay the debts of the succession*, must bring the full amount of its appraisement. Otherwise, its sale will be annulled.

Actions to set aside public sales on account of any informalities connected with them, are prescribed, as to *all* persons, in five years.

A PPEAL from the Third Judicial District Court, parish of St. Mary. Train, J.

Fred Gates, for plaintiff and appellant.

A. L. Tucker and *D. Caffrey*, for defendant.

The opinion of the court was delivered by

SPENCER, J. The material facts of this case are as follows:

Nancy M. Theall, wife of Malcom A. Fraser, died in 1851 in St. Mary parish, where they resided, leaving four children, issue of the marriage, to wit: plaintiff and three others.

The husband, Fraser, qualified as natural tutor of his minor children, and James Lacey, of St. Mary, was appointed the under-tutor by the probate court of said parish. An administrator was appointed to the estate of the deceased wife, and, after settlement, the balance, some five thousand dollars, in his hands was paid over to the tutor. There remained also property of the wife's paraphernal estate, consisting of a house and lot in the town of Franklin, in said parish, and several slaves. About 1853 the tutor and father removed to and became domiciliated in the city of New Orleans, taking his minor children with him.

In December, 1854, the tutor applied to the Second District Court of Orleans to convene a family meeting to advise as to the necessity and propriety of selling the said lot and slaves. The meeting was ordered and the under-tutor notified to attend. He failed and neglected to do so, and declined to resign. Thereupon the tutor instituted suit in the said Second District Court to remove him from office. After having been cited and making default, he was destituted by decree of said court.

Thereupon another under-tutor was appointed. The family meeting convened and advised and recommended the sale as necessary to educate and maintain the minors. Their deliberations were duly homologated and a decree rendered directing the sale as advised. A commission issued to the sheriff of St. Mary, and the property, after due and legal advertisement, was sold. It appears by the inventory taken in 1851 that this house and lot were appraised at twelve hundred dollars and

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the slaves at twenty-six hundred dollars. At the sale by the sheriff the house and lot were adjudicated to one Stevens at eight hundred dollars, and the slaves (omitting one not sold) brought \$3166. This sale was made on the ———, 1855.

The plaintiff sues to recover this house and lot, on the ground that the proceedings were illegal and void. She claims that she is sole owner, and entitled to recover for the reasons:

First—That the tutor was without capacity to stand in judgment for removal of the under-tutor.

Second—That the court of St. Mary alone had jurisdiction of a suit for his removal.

Third—That the minors' property could not be sold for less than its appraisement.

The defendant sets up various defenses, which it is not necessary to specify, and calls in warranty his vendor, who in turn calls his vendor, etc. The main points of defense are that the proceedings by which the property was sold were regular; that the decree of sale by the Second District Court, having jurisdiction, protected the purchaser against all irregularities anterior to judgment and prescription.

First—As to the capacity of the tutor to sue for the removal of the under-tutor: The plaintiff contends that that suit could only be brought by a curator *ad hoc*, appointed by the court, and cites 10 La. 82. That case simply decides that the uncles of a minor, as such, could not sue to destitute an under-tutor, as they did not represent the minor. Our Code is silent as to the person who shall bring such suit, but provides that any person knowing cause for the removal of tutors may give information to the judge, who may appoint a curator to bring the suit. It seems to us that the tutor, representing, above all others, the minor, is eminently a proper person to provoke the removal of the under-tutor who fails in his duty. Because a curator appointed by the judge may also do so is no argument against the right of the tutor. It is only an additional means provided by law to secure fidelity in its officers.

The second ground, that the probate court of St. Mary alone had jurisdiction to remove the under-tutor, is, we think, untenable. The under-tutorship is a mere accessory to the tutorship; and as it is not disputed that the Second District Court of New Orleans was seized of jurisdiction of the tutorship from the moment the natural tutor and his children became domiciliated there, it would seem that its jurisdiction extended to all of its incidents. Any other construction of the law would lead to infinite confusion. Article 1013 of the Code of Practice must be construed in connection with other provisions of the law, and is not mandatory in its terms. It says "tutors, etc., may be removed by the court of probates which appointed them." It has been held that

"the court of the minor's domicile must accept the under-tutor's resignation, and appoint a successor. So, the minor's domicile being attendant on the tutor's, when the latter, after appointment of an under-tutor, removes to another parish, to the judge of the latter must the under-tutor address his resignation." C. C. 289; 14 La. 478; 2 R. 418; 14 An. 565.

Besides, this objection as to the right of the tutor to sue to remove the under-tutor goes to matters anterior to judgment, and, as we hold that the Second District Court properly took jurisdiction, can not affect a purchaser under a decree of said court. It is well settled that a purchaser is not bound to look beyond such decree.

Third—The only irregularity or illegality subsequent to judgment that appears or is complained of is that the house and lot sold for less than its appraised value. The property sold was that of minors. Article 342 of the Civil Code declares that "the minor's property can not be sold for less than the amount of its appraisalment." It does not appear that any other appraisalment than that in the inventory of 1851 was ever made, and we must presume that that was the appraisalment under which the sale took place. As we have seen, the property ordered to be sold brought in the aggregate more than its appraisalment, but this particular house and lot only brought and was adjudicated for two thirds of its appraisalment. Defendant insists that this is a substantial compliance with the law, and shows that the property was not sacrificed; and that this fact, coupled with the further fact that Trowbridge, one of the subsequent purchasers thereof, sold it some few years afterward for nine hundred dollars, justifies the inference that it brought all it was worth. We are aware that this court has held that the sale of a minor's property to pay the ancestors' debts may under certain circumstances be made for less than its appraisalment; but we think the property in those cases was rather that of a succession than that of a minor, and that the law as laid down in articles 990, 991, and 992 of the Code of Practice, governing sales of succession property, received a most liberal interpretation in the cases where this court so held.

While, upon the doctrine of *stare decisis*, we would be loth to depart from the rule that succession property sold to pay debts may, on first offering, be sold for less than its appraisalment, provided that the price brought be in fact its full value, though less than its appraisalment, we are not disposed to extend the rule to property belonging exclusively and strictly to minors. We prefer to adhere to the letter of the law, that it can not be legally sold for less than its appraisalment. C. C. 342, *et seq.*

But the defendant interposes the plea of prescription to this action to annul the sheriff's sale of this property in 1855.

By act of 1835, re-enacted in 1855, and now incorporated in the Revised Civil Code as article 3543, it is provided that "all informalities

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connected with or growing out of any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons." It is manifest that the adjudication of a minor's property for less than its appraisement is not absolutely null, but only annullable. The adjudication of it by the sheriff for less than its appraisement is an informality and illegality of the sale, like that made without advertisement, or with an insufficient advertisement, or without appraisement, and the like. We think the defendant is protected by this prescription, as it runs against minors, and more than twenty years had elapsed between the day of the sale and the institution of this suit.

As we have stated, this sale was made on the application of the plaintiff's tutor, recommended by a family meeting, and approved and ordered by a competent court, for the purpose of providing means of educating and maintaining her and the other minor children. Are we to *presume* that all this was a fraud? that, after receiving the proceeds of this sale, plaintiff's father, dishonestly and in disregard of his official oath and duty, diverted these funds from the objects to which they were destined and converted them to his own use? If not, and if the presumption is in favor of his having dealt honestly with his wards and fulfilled his duties, then, in the absence of contrary proof, we must presume that the money proceeding from said sale inured to plaintiff's benefit, and she could not recover without a previous restitution of the price.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs of both courts.